FILED

SUPREME COURT OF

OCTOBER TERM,

No. 548

A. L. KATATE,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF

William F. McDermott,
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SUPREME COURT OF THE UNITED STATES

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No. 548

A. J. ZAYATZ,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Comes now A. J. Zayatz, and respectfully petitions this Honorable Court to grant and to issue its Writ of Certiorari directed to the Supreme Court of Alabama (hereinafter referred to for convenience as the Court Below), directing it to send to this Court for review its original opinion rendered May 16, 1946, in this cause lately there pending, styled A. J. Zayatz, Appellant, vs. Southern Railway Company, Appellee, No. 343 on the docket of said Court, wherein the Lower Court affirmed decrees of the Circuit Court of Lauderdale County, Alabama, in said cause, in favor of Appellee and against your Petitioner herein.

Your Petitioner further states that he timely presented to the Court below and filed therein his petition for a rehearing of said cause, which said petition for a rehearing was overruled by said Court on June 27, 1946.

Opinion of the Court Below

The opinion of the Court below, which is by this petition sought to be reviewed, appears on pages 25 to 31 inclusive of the printed Transcript of the Record filed herein. The opinion has not yet been officially published in the official reports of the Supreme Court of Alabama, but appears in 26 Sou. (2d) 545.

Jurisdiction of This Court

The matters sought to be reviewed involve the denial of rights asserted by Petitioner in the Courts below, which rights are granted by a Federal Statute, namely, the Federal Employers Liability Act, 45 U. S. C. A. Section 51, 35 Statutes 65, and particularly Section 6 of said Act. The jurisdiction of this Court is based upon Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Statutes 937, Title 28, U. S. C. A., Section 344 (b), providing for review in this Court by certiorari of decisions of the highest Courts of the several States wherein any title, right, privilege or immunity is specially set up or claimed under a Statute of the United States.

Bailey v. *Central Vermont Railway Company,* 319 U. S. 350, 87 L. Ed. 14, 44;

Seago, Administratrix, v. *N. Y. Central Railway Co.,* 315 U. S. 781, 86 L. Ed. 1188, 62 Sup. Ct. 806;

B. & O. R. Co. v. *Kepner,* 314 U. S. 44, 62 Sup. Ct. 6, 86 L. Ed. 28.

The Supreme Court of Alabama is the Court of highest authority in that State. Constitution of Alabama, Article 6,

Sections 139, 140 and 151. While the Court may sit in sections composed of four judges, Code of Alabama, 1940, Title 13, Chapter 2, Section 11, there are no provisions for a transfer or consideration of a case by the Court as a whole, except to overrule a former decision (Section 11), or where there is a dissent by one of the Justices (Section 13).

Statement of the Matter Involved

This action was commenced in the Circuit Court of Lauderdale County, Alabama by Southern Railway Company, a Corporation, as Complainant against your Petitioner, A. J. Zayatz, as Respondent. For clarity, we shall hereinafter refer to Complainant as Southern, and to Zayatz by name, or as Petitioner.

The suit was brought under the uniform Declaratory Act of Alabama, Code of Alabama, 1940, Title 7, Section 156 *et seq.* The object was to secure a construction of a contract of release, and a declaration of the rights of Southern and Zayatz under the same. The Bill further prayed an injunction *pendente lite* restraining Zayatz from, either in person, or by agent or attorney, filing or prosecuting a suit or action of any nature against the Southern in any forum, State or Federal in the United States to recover damages for personal injuries received by Zayatz on February 28, 1945, while employed by Southern. The Circuit Court issued the injunction as prayed for, R 13.

Zayatz separately filed a demurrer to the Bill of Complaint, R 17, and also a motion to dissolve the injunction, R 15. The Court entered decrees, R 22 and 23 overruling the demurrer and the motion to dissolve the injunction. In due course, Zayatz prosecuted an appeal to the Supreme Court of Alabama, which Court, on May 16, 1946, filed its opinion affirming the decrees of the lower court. In due

time, Petitioner filed his motion for a rehearing, which was denied on June 27, 1946, R 36.

The Bill of Complaint as amended, alleged that on February 28, 1945, and at all times since that date, Southern was a common carrier by railroad in interstate commerce, being a Corporation of the State of Virginia, but doing business in Alabama and other States; that Zayatz is a citizen of Alabama; that on February 28, 1945, while Zayatz was employed by the Southern Railway Company as a switchman in interstate transportation and commerce, he sustained injuries at Sheffield, Alabama, by being struck and run over by a railroad car, resulting in the amputation of both of his legs above the kness, R 2; that on April 12, 1945, at Florence, Alabama, Zayatz and the Railway Company's Claim Agent agreed upon a settlement of all claims arising out of said nijuries, in consideration of the payment to Respondent of $10,000.00, evidenced by a written release or contract, executed by Zayatz on said date; that the railway company delivered to him a draft of $10,000.00; that said draft was thereafter presented for payment and cashed by him.

The Complaint then avers that Zayatz later employed an attorney at St. Louis, Missouri, who had notified the Complainant that Zayatz desired to rescind the release contract, and Complainant averred it believed that it was threatened with a suit in a Court in St. Louis, Missouri, on account of the injuries theretofore sustained by Zayatz.

The Complaint avers that if Complainant is sued outside of the State of Alabama, it would be obliged to transport numerous witnesses, including its employees; that St. Louis, Missouri is distant from Sheffield, Alabama, and the defense of a suit in St. Louis, Missouri would impose a serious and undue burden on interstate commerce, and would seriously interfere with Complainant's ability to maintain

adequate transportation service in interstate commerce. By amendment, it was alleged that there was no suit presently pending wherein the validity of the release could be determined, R 20; that if sued outside of the State of Alabama, Complainant would not be able to compel the attendance of witnesses, R 20; that the Statute of Limitation governing Petitioner's right to sue for damages on account of injuries is three years, and that the Complainant runs the risk of losing the testimony of any or all of its witnesses as the result of death or removal to parts unknown, R 21; that Complainant has no adequate remedy of law, R 20.

Among the grounds for the demurrer were the following:

(1) As disclosed by the Bill of Complaint, any action which Zayatz might have against the railroad company would be under the Federal Employers' Liability Act since the Complaint alleged that Complainant and Zayatz were engaged in interstate commerce at the time of his injuries; that the release pleaded in the Complaint would be an issue in any suit for damages, and its validity and binding effect fully determined therein; that to compel Zayatz to litigate the release issue in the present proceedings for declaratory judgment would be to deprive Zayatz of a trial of the cause of his action under the Federal Act, and thus deprive him of a valuable Federal right, R 18, 19.

(2) Section 6 of the Federal Employers' Liability Act confers jurisdiction of causes of action arising thereunder upon the District Courts of the United States, and of the Courts of the several States; that, as construed by the Supreme Court of the United States, an injured employee has the right to select his forum and to institute his suit in any forum wherein legal process can be validly had on the carrier, regardless of where the cause of action accrued; that the employee may not be enjoined or restrained from

selecting his forum; that the instant proceeding violates Section 6, in that it would deprive the Respondent of the right given him to select his forum.

The motion to dissolve the injunction assigned as grounds therefor, the same Federal grounds as were contained in the demurrer.

Although the Complaint alleged only that Complainant was threatened with a suit in St. Louis, Missouri, the Supreme Court of Alabama held in its opinion,

> "The further argument, in substance, is that the Complainant must stand by, mark time, and await the pleasure of the Respondent as to when and where he will file such action. And if in the meantime, it desires to protect itself against loss of the testimony of its witnesses, it must proceed, under the Statutes of the several States wherein it is engaged in business to perpetuate their testimony.
>
> "We are not of opinion that such remedy would be adequate and complete under the peculiar facts of this case."

Questions Presented

I

Does the fact that Section 6 of the Federal Employers' Liability Act allows a suit wherever the carrier is doing business, and provides that the suit may be brought within three years, warrant the State Court in entertaining a declaratory judgment suit instituted by the carrier upon the ground that it has no adequate remedy at law, even though the carrier may plead a release in bar of any action instituted by the employee?

II

Does not Section 6 of the Federal Employers' Liability Act, as construed by this Court, give to injured railroad employees (and their personal representatives in case of

death) the right to choose their forum for the determination of their rights under the Federal Employers' Liability Act including possible defenses, such as compromise and settlement?

III

May a State Court enjoin a railroad employee from instituting an action under the Federal Employers' Liability Act, even though such injunction is temporary and intended to preserve the status quo?

(If such an injunction could be maintained, it could conceivably remain in force until after the Statute of Limitations had run against a claim under the Federal Act, thus defeating the cause of action.)

Upon principle, therefore, may an injunction *pendente lite* be issued at all without violating Section 6 of the Federal Act?

IV

By maintaining a suit for a declaratory judgment to determine the validity of a defense to a cause of action under the Federal Employers' Liability Act, may the carrier validly deprive the employee of the full three year period of limitation provided by the Federal Act? and:

Does the asserted risk of losing testimony of its witnesses by death or removal if the employee should delay his action until near the end of the limitation period give to the carrier the right to institute a suit in a State Court to determine the validity of a defense?

V

Does the claimed burden upon interstate commerce of defending an action in a State other than that in which it accrued, and the risk of losing evidence by lapse of time, warrant a State Court in entertaining suit instituted by the

carrier to adjudicate a defense which, if decided in favor of the carrier, will defeat a claim for damages?

VI

May an employee be required to try his case piecemeal by litigating the validity of the carrier's defense in a Court of the carrier's choosing, although, if successful, the employee may thereafter avail himself of the venue provisions of Section 6 of the Federal Act?

Reasons Relied upon for the Allowance of the Writ

I

Maintenance of declaratory judgment proceedings in the Courts Below contravenes the venue provisions of Section 6 of the Federal Employers' Liability Act.

The Bill of Complaint to which the Court must look for the facts alleges that the Southern Railway Company is a common carrier by railroad, engaged in interstate commerce; that on February 28, 1945, A. J. Zayatz (your Petitioner) sustained injuries while in the course of his employment by the railway company in interstate commerce, resulting in the amputation of both of his legs above the knees. Any cause of action, therefore, that he may have to recover damages for such injuries, is exclusively under the Federal Employers' Liability Act. Section 6 of said Act confers jurisdiction upon the United States District Courts and the Courts of the several States. This Court has construed Section 6 as giving to the employee the right to institute suit to recover damages in any Court where valid service of process may be had upon the carrier. This Court has further held that the choice of venue may not be defeated, because such venue may be remote from the site of the accident, and that the railroad may be put to great expense and hardship in defending such suit, and interstate

commerce may be thereby unduly burdened. See *Miles* v. *Illinois Central Railroad Co.*, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129; *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, 62 Sup. Ct. 6, 86 L. Ed. 28; *Hoffman* v. *State of Missouri ex Rel. Foraker*, 274 U. S. 21, 47 Sup. Ct. 485, 71 L. Ed. 905. By maintaining the declaratory judgment proceedings and the injunction *pendente lite*, the Alabama Courts have deprived Petitioner of the right to select his venue. The opinion of the Court Below in upholding the Trial Court in overruling the demurrer and motion to dissolve injunction is in direct conflict with the decisions of this Court just above mentioned.

II

The release pleaded may be set up as a defense to any cause of action asserted by Zayatz under the Federal Employers' Liability Act.

Petitioner should not be required to try his case piecemeal, and to litigate the validity of a defense to determine whether he may institute his principal cause of action elsewhere.

(a) If the railroad may, by declaratory proceedings, litigate one defense, it may have other defenses similarly determined, and thus the venue provision of the Act of Congress will be circumvented.

III

The injunction *pendente lite* upheld by the Court Below, though temporary, operates to deprive Petitioner of the right given by Section 6 of the Federal Employers' Liability Act to select his venue and to institute his suit.

If a temporary injunction may be maintained, it could in some situations, remain throughout the limitation period of three years allowed by Section 6 of the Federal Em-

ployers' Liability Act, and an injured employee thus deprived of the right to assert his cause of action.

It is no excuse to say, as did the Court Below, that the carrier should not be required to await the pleasure of the employee, and thus run the risk of losing its testimony, or of incurring the expense of preserving it under the Laws of the several States in which it operates. If Congress thought such considerations required, it would have provided a shorter period of limitation. State Courts should not be permitted to shorten the period afforded by the Act of Congress.

IV

The questions presented are of importance. This is the first time that a State Court has sought to accomplish, by declaratory judgment proceedings, the restriction of venue and shortening of limitation period. Prior to the *Kepner* and *Miles* decisions, *supra,* some State Courts had by granting injunctions, defeated the venue provisions of the Federal Act. The proceedings in the Court Below are an attempt to accomplish by another means, that which the Act of Congress and this Court has said may not be done.

If successful, other carriers may attempt to avoid the Act by the institution of suits for declaratory judgments to determine any other rights under the Act. For example, a suit might be brought to determine whether the injured employee was guilty of contributory negligence, and in what proportion, or to determine whether the employee was solely negligent. By such devices, Section 6 of the Act of Congress could well be sterilized in many cases.

Prayer

Wherefore, Petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Alabama, directing that Court to certify to this Court on

a day certain to be named therein, a full and complete transcript of the record of the proceedings in said cause of A. J. Zayatz, Appellant, vs. Southern Railway Company, a Corporation, Appellee, being No. 343 upon the docket of said Court, to the end that the judgment and decree of the Court Below rendered in said cause may be reviewed by this Court, as provided by law, and that upon such review, the judgment and decrees of the Supreme Court of Alabama in said cause, shall be reversed, and that Petitioner shall have such relief as this Court shall deem appropriate.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Summary of Argument

I

This Court has jurisdiction. Petitioner specially set up and claimed rights arising under a Statute of the United States, the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. A. Section 51 *et seq.*, and the decision of the Court Below was against such right. Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, Title 28, U. S. C. A. Section 344(b), provides for a review in this Court by certiorari of decisions of the highest Courts of the several States, where any right, title, privilege or immunity is specially set up or claimed under a Statute of the United States.

Bailey v. *Central Vermont Ry.*, 319 U. S. 350, 87 L. Ed. 14, 44, 63 S. Ct. 1062;

Mondou v. *New York N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169;

Seaboard Air Line R. Co. v. *Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 S. Ct. 635.

II

The right claimed by Petitioner in the Courts Below was the right to choose his own venue (where legal process could be obtained) to litigate his claim for damages under the provisions of the Federal Statute, this right to select a forum necessarily including the trial of all issues which might arise in the controversy. The decrees of the Court Below which require Petitioner to litigate one of the issues in a Court selected by the railway company, operate

as a final adjudication and denial of the Federal rights specially claimed.

Department of Banking, State of Nebraska v. *Pink*, 317 U. S. 264, 268, 87 L. Ed. 254, 63 S. Ct. 233.

The forclosure of the Federal right asserted is as final as the denial of a writ of prohibition sought upon the ground that the Lower Court is exceeding, or is about to exceed its jurisdiction.

Michigan Central Railroad Co. v. *Mix*, 278 U. S. 492, 49 S. Ct. 207, 73 L. Ed. 470;

Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8 52 S. Ct. 103, 76 L. Ed. 136.

III

Section 6 of the Federal Employers' Liability Act, 45, U. S. C. A. 56, confers jurisdiction upon the United States District Courts, and the Courts of the several States. This Court has construed Section 6 as giving to an injured employee, or his personal representative in case of death, the right to select his forum for the institution of a suit under the Act. This is a valuable Federal Right, which may not be abridged or denied by the State Courts.

Baltimore & Ohio R. Co. v. *Kepner*, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28;

Miles v. *Illinois Central R. Co.*, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129.

IV

The alleged burden upon interstate commerce would not be a special circumstance justifying circumvention of the venue provision (Section 6) of the Federal Act by resort to injunction or declaratory judgment proceedings.

Hoffman v. *State of Missouri, ex rel. Foraker*, 274 U. S. 21, 47 S. Ct. 485, 71 L. Ed. 905.

V

The burden on interstate commerce, inconvenience to the carrier, and the risk of losing evidence by death or removal of witnesses within the period of limitation afforded by the Federal Act did not justify the Court Below in denying Petitioner's asserted right to select his venue, even though the Lower Court thought the carrier did not have an adequate remedy at law. See cases cited under points III and IV, *supra.*

VI

The injunction *pendente lite* upheld by the Court Below, though temporary, nevertheless operates to deprive Petitioner of the right of selection of venue. Such an injunction might conceivably, by remaining in force throughout the limitation period, deprive an employee of his cause of action. The granting of an injunction is, therefore, the denial of a Federal right, and in sustaining the same, the Court Below brought its opinion into conflict with the *Kepner* and *Miles* decisions of this Court, above cited.

VII

The questions presented by this petition for certiorari, are of importance in the operation and construction of the Federal Employers' Liability Act. Heretofore, injunctions had been granted by State Courts, but the power of such Courts to enjoin an action has now been definitely denied by this Court. The instant proceedings are but another device to accomplish what this Court has said may not be done.

If the validity of one defense may be determined at the instance of the carrier in a Court of its selection, then upon principle any other defense may be so determined, and thus

the venue provision (Section 6 of the Federal Act) rendered sterile.

Argument

I and II

The jurisdiction of this Court is clear. Section 237 of the Judicial Code (28 U. S. C. A. 344 (b)) provides for certiorari to review the judgment or decree of the highest Court in a State:

> "Where any title, right, privilege or immunity is specially set up or claimed by either party under * * * any * * * Statute of * * * the United States."

The right claimed by Petitioner in the Courts Below and specially set up by him, was the privilege of selecting his forum for the determination of his right to recover damages for injuries sustained by him while employed by the carrier in interstate commerce. This right is given Petitioner by Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. Section 56). Therefore, this Court has jurisdiction to grant the writ.

We are not unmindful of the provision of Section 237, that there must be a final judgment or decree in the State Court, but we submit that the opinion of the Court Below overruling Petitioner's demurrer and motion to dissolve the injunction is in effect, the final adjudication and denial of the Federal Rights specially claimed. Petitioner must, under the decree, stand trial in a forum selected by the railway company, and to litigate the validity of one of the railway company's defenses. We think that Section 6 of the Federal Employers' Liability Act is intended to afford the employee the privilege of selection of his venue, not only to litigate the question of the carrier's negligence, but also to determine the whole controversy, including any defenses

which may be interposed by the carrier. That is the right asserted by Petitioner in the Court Below and denied by it. The decision of the Lower Court is as final on the subject as it ever can be. No useful purpose would be served by requiring Petitioner to litigate the merits of the release issue in the Circuit Court of Lauderdale County, Alabama, then, if unsuccessful, appeal again to the Supreme Court of Alabama, and, if there unsuccessful, then petition this Court for its writ. Section 6 of the Federal Employers' Liability Act was intended for his benefit. He cannot be made to (borrowing the language of Mr. Justice Jackson in his concurring opinion in *Miles* v. *Illinois Central Railroad Co.*, hereinafter cited, 62 S. Ct. l. c. 832):

> "Try one law suit at home to find out whether he would be permitted to try his principal law suit elsewhere."

We think it clear, therefore, that there has been a final judgment and decision against Petitioner upon the Federal rights specially claimed.

As to finality, the situation would seem to be analogous to proceedings for a writ of prohibition. If a Lower Court is exceeding, or about to exceed its jurisdiction, a proper remedy is a writ of prohibition sued out in a higher Court. The denial of such a writ of prohibition is undoubtedly a final judgment. This Court has so held.

Michigan Central Railroad Co. v. *Mix*, 278 U. S. 492, 49 S. Ct. 207, 73 L. Ed. 470;

Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8, 52 S. Ct. 103, 76 L. Ed. 136.

In *Department of Banking* v. *Pink*, 317 U. S. 264, 87 L. Ed. 254, l. c. 317 U. S. 268, this Court said:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under

> local rules of practice the judgment is denominated final * * *, but rather whether the record shows that the order of the Appellate Court has in fact, fully adjudicated rights, and that that adjudication is not subject to further review by a State Court."

In the present case, the decision of the Supreme Court of Alabama affirming the decrees of the Circuit Court fully adjudicated the Federal right claimed by Petitioner. It is not subject to further review by the State Courts. Upon a second appeal, the decision of the Supreme Court would be the law of the case.

III

The decision of the Court Below was the denial of a valuable Federal right, and in conflict with the decisions of this Court hereinafter referred to. Section 6 of the Federal Employers' Liability Act, 45 U. S. C. A. 56, confers jurisdiction of actions under the Act upon the District Courts of the United States, and, concurrently, the Courts of the several States. Suit may be brought where defendant resides, where the cause of action arose, or where defendant is doing business. It further provides that suit may be commenced within three years from the date the action accrued, as amended August 11, 1939, Chapter 685, Section 2, 53 Stat. 1404. For some years, various State Courts enjoined citizens of the State from instituting or prosecuting actions against the carriers in States other than that of the place of injury. But this Court has denied the right of injunction in such circumstances pointing out that Section 6 was intended for the benefit of the employees or their personal representatives in case of death, and may not be restricted, modified or frustrated by any Courts.

In *Baltimore & Ohio R. Co.* v. *Kepner,* 314 U. S. 44, 62 S. Ct. 6, Kepner, a resident of Ohio, was injured while in the employe of the railroad company in Ohio, and brought

suit in a Federal Court in the State of New York. The railway company unsuccessfully sought an injunction in the Ohio Courts. This Court sustained the Supreme Court of Ohio in denying the injunction, holding that the Court would have been without power to enjoin the prosecution of action for damages in a Court distant from the place in which the cause of action accrued. We note that the same grounds were urged for the injunction as appear in the instant case, namely, hardship, inconvenience and expense to the railroad, and the burden on its interstate commerce. After a thorough discussion of Section 6, the Federal Employers' Liability Act, this Court said, 62 S. Ct. 10:

> "It is obvious that no State Statutes could vary the venue (given by Section 6 of the Federal Act) and we think equally true that no State Court may interfere with the privilege, for the benefit of the carrier or the national transportation system, on the ground of inequity based on cost, inconvenience or harassment."

In *Miles* v. *Illinois Central Railroad Co.*, 315 U. S. 698, 62 Sup. Ct. 827, Miles was killed while employed by the Illinois Central in its yards at Memphis, Tennessee. His widow employed attorneys in St. Louis, Missouri to prosecute a claim for damages on account of the death. The State Court of Tennessee sustained an injunction restraining the prosecution of an action in a State of Federal Court in St. Louis, Missouri. On certiorari this Court reversed the Supreme Court of Tennessee.

> "The grounds for the injunction were the inconvenience and expense to the Illinois Central of taking Memphis employees to St. Louis, and the resulting burden on interstate commerce. (62 S. Ct. l. c. 828) This Court said, 62 S. Ct., l. c. 829:—
>
> "In the Kepner case, we pointed out, with a discussion of applicable cases, that the carrier must submit to inconvenience and expense, if there is jurisdiction,

> although thereby interstate commerce is incidentally burdened. There is no occasion to repeat the comments here. The specific declaration in Section 6 that the United States Courts should have concurrent jurisdiction with those of the several States, and the prohibitions against removal point clearly to the conclusion that Congress has exercised its authority over interstate commerce to the extent of permitting suits in State Courts, despite the incidental burden where process may be obtained on a defendant, not merely soliciting business, but actually carrying on railroading by operating trains, and maintaining traffic offices within the territory of the Courts' jurisdiction.
>
> "Since the existence of the cause of action, and the privilege of vindicating the rights under the Federal Employers' Liability Act in State Courts spring from Federal Law, the right to sue in State Courts of proper venue where their jurisdiction is adequate, is of the same quality as the right to sue in Federal Courts. It is no more subject to interferences by State action than was the Federal venue in the Kepner Case."

In *Hoffman* v. *State of Missouri ex. rel. Foraker,* 274 U. S. 21, 47 S. Ct. 485, wherein suit was brought in Missouri upon a cause of action accrued in another State. This Court said, 47 S. Ct. l. c. 486:

> "Even a foreign corporation is not immune from the ordinary process of the Courts of a State, where its business is entirely interstate in character. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened."

In *Union Pacific Railroad Co.* vs. *Utterbach,* 146 Pac.(2d) 76, the right to institute a suit in California upon a cause of action accruing in Oregon, was sustained by the Supreme Court of Oregon, which denied the injunctions. This Court denied certiorari, 323 U. S. 711, 65 S. Ct. 36.

There is no longer any doubt but that the privilege afforded to railroad employees by Section 6, is a valuable right to be protected by this Court.

It may be argued by Respondent that the right was not permanently denied; that the injunction is merely temporary to preserve the status quo, while the declaratory judgment suit is being determined. We think the duration of the injunction is of no consequence. The maintenance of the injunction for one day is to that extent, an invasion of Petitioner's rights. Conceivably, an injunction *pendente lite* could remain in force throughout the entire period of limitation, and thus an employee's cause of action under the Federal Employers' Liability Act would be lost. It cannot now be forecast how long the instant litigation might continue. Even though the suit for declaratory judgment brought by the railroad company might ultimately result in Petitioner's favor, it might then be too late to institute a suit to recover damages for his injuries. Upon principle, therefore, an injunction *pendente lite* is not to be justified any more than a permanent one.

It may also be argued by Respondent that if the release is binding upon Petitioner, then he has lost no rights under the Federal Act, because he had no cause of action to assert; that he had, in fact, extinguished his cause of action. We submit, however, that the release is nothing more than a defense to the Petitioner's cause of action which may be pleaded and determined in any suit that Petitioner might bring to recover damages for his injuries. What the railway company seeks in the instant case is a determination of the validity of one of its defenses. But if a carrier is to be allowed to seek a forum, and there litigate one of its defenses, it may do so as to other defenses. Suppose for instance that the railroad company wanted to determine whether the Petitioner was guilty of contributory negligence,

and to what extent, or in what proportion. It might bring a suit for a declaratory judgment to determine such issue. A predetermination of whether the employee was solely negligent, would, if determined in favor of the carrier, forever bar the employee from instituting an independent action of his own. So in the present case, we submit the railway company should not be allowed to maintain the suit for declaratory judgment, litigate the validity of a defense, and thus prevent Petitioner from exercising his right to select the venue afforded him by Section 6.

IV and V

There was no special circumstance in this case justifying the restriction of Petitioner's right to choose his forum. The Court Below justified the decree overruling demurrer to the Bill of Complaint upon the ground that the railway company did not have an adequate remedy at law. Counsel for the employee had called to the Court's attention the fact that the release could be pleaded in defense of any suit that might be brought anywhere by Zayatz to recover damages, and its validity determined in such action. It was further pointed out that the danger of losing testimony was inherent in every controversy; that it constituted no special circumstance in the case at bar; and that if there be danger of losing testimony, the railway company could take steps to preserve it. Missouri has provisions for the preservation of testimony outside the State to be used in a contemplated action within the State. Revised Statutes of Missouri, 1939, Chapter 9, Article 6, Sections 1953 to 1970 inclusive. The Supreme Court of Alabama has consistently held that declaratory judgment proceedings may not be maintained where there is an adequate remedy at law available. See *Donohue* v. *Bunkley*, 25 Sou. (2d) 61, l. c. 70 and cases therein cited. *Goltsman* v. *American Life Insurance*

Company, 26 Sou. (2d) 596. Nevertheless, the Court Below held R 29;

> "The further argument, in substance, is that the Complainant must stand by, mark time, and await the pleasure of the Respondent as to when and where he will file such action. And, if in the meantime, it desires to protect itself against loss of the testimony of its witnesses, it must proceed under the Statutes of the several States wherein it is engaged in business to perpetuate the testimony.
>
> "We are not of opinion that such remedy would be adequate and complete under the peculiar facts of this case."

It will be noted that the Complaint alleged only belief on the part of the railway company, that it was threatened with a suit in a Court in the State of Missouri, R 4.

The question, therefore, sharply arises as to whether the fact that the Act of Congress permits suits for damages wherever valid service may be obtained upon the carriers, and allows the injured employee three years within which to bring his suit, justifies a State Court in entertaining any proceedings that will either deprive the employee of his choice of forum, or force him to engage in litigation before he is ready. We think the answer to this question must undoubtedly be in the negative. The facts of the instant case are not peculiar. The railway company is faced with no greater hazard than any other railway company in any other such controversy. No doubt the Congress gave consideration to the expense and burden on commerce incident to such a broad venue provision. No doubt it gave consideration to the danger of the loss of testimony by death or removal to parts unknown, when it originally provided for a limitation of two years, and then in 1939 extended it to three years. If the venue provision and the limitation are

too broad, it is a matter for Congress as this Court has stated. (*B. & O. R. Co.* v. *Kepner*, 314 U. S. l. c. 54.)

VI

Under point III, we discussed the force and effect of the injunction *pendente lite*. We may add this further observation. Suppose that an employee signing a release does not discover the fraud which induced him to sign it until very near the end of the limitation period. Then he threatens suit. Then the railway company brings a suit for declaratory judgment, and obtains an injunction *pendente lite* upon the theory of preserving the status quo. In this situation, and others which might arise, the temporary injunction would, so far as the right of the employee is concerned, be a fatal injunction.

VII

We respectfully urge that the questions presented by this petition are of importance in the construction and application of the Federal Employers' Liability Act. Prior to the *Kepner* and *Miles* decisions, various State Courts had, by injunction, restrained railway employees from instituting suits in other States. Generally, the railway companies were successful in securing injunctions for the asking. It was this abuse, and avoidance of Section 6 of the Federal Act, that this Court ended in the *Miles* case. Now, we have for the first time a new device—suit for declaratory judgment to determine the validity of a defense to a cause of action under the Federal Act. Coupled with it is an injunction *pendente lite* to preserve the status quo until the machinery of the State Courts may be operated to foreclose a railway employee's Federal rights.

Shall a carrier use the declaratory judgment action in a State Court to defeat a Federal right when this Court has

said that the equity powers of the State Courts may not be used for an injunction to accomplish the same purpose? We submit not.

Petitioner respectfully prays the Court to issue its writ of certiorari to the end that the questions presented may be authoritatively decided.

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 548.

A. J. ZAYATZ, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, a corporation, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION OF THE COURT BELOW.

The opinion of the court below sought to be reviewed has not yet been officially reported. It is reported in 26 So. (2d) 545, and it will be found in the record at pages 25 to 31, both inclusive.

JURISDICTION OF THIS COURT.

Respondent submits that this Court is without jurisdiction to grant the petition and to review by certiorari the judgment of the court below, because that judgment is a purely interlocutory judgment, affirming the action and judgment of the trial court in overruling a demurrer to the complaint and amended complaint and in denying petition-

er's motion to dissolve an interlocutory injunction *pendente lite* issued to preserve the *status quo* and to preserve the trial court's jurisdiction over the main cause pending its final determination.

The judgment of the court below sought to be reviewed is in no sense a final judgment or decree or a final determination of the cause.

The only statute invoked by the petition and supporting brief as the basis for jurisdiction of this Court is Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, 28 U. S. C. 344 (b), which is insufficiently paraphrased (Petition, 2; Brief, 12) and quoted (Brief, 15), in that, in each instance, the statutory requirement of finality of the State court judgment or decree is omitted.

The said jurisdictional statute, in so far as here pertinent, and as amended by the Act of January 31, 1928, Chapter 14, 45 Stat. 54, abolishing writs of error and substituting appeals, provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party * * * under * * * any * * * statute of * * * the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *."

This requirement, that the judgment of the State court sought to be reviewed be *final*, dates from 1789 and has an historical ground in the avoidance of conflict between the courts of two different governments. It is not a technical-

ity to be easily scorned. It is an important factor in the smooth working of our federal system. *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123-124.

It means that the judgment sought to be reviewed must be final in two senses: "it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co.* v. *Comm'n*, 324 U. S. 548, 551.

The Supreme Court of Alabama is, of course, the "final court" in that state. However, it has here said no "final word." Its judgment is not "an effective determination of the litigation." It affirms only "merely interlocutory or intermediate steps therein." On this record no court of Alabama, neither the trial court nor the Supreme Court, has said a final word or effectively determined the litigation.

STATEMENT OF THE CASE.

The only facts of record are those alleged in respondent's bill of complaint (R., 2-9) and amendment to bill of complaint (R., 20-21) and admitted by petitioner's demurrer (R., 17-19). In so far as necessary to disposal of the present petition, they are:

Respondent here, complainant in the trial court, is a Virginia corporation, legally qualified to do business in Alabama. It is and was engaged in business as a common carrier by railroad, engaged in commerce between the States. (R., 2, par. I)

Petitioner here, respondent in the trial court, is a citizen and resident of Alabama, over the age of twenty-one years (R., 2, par. II).

To correspond to petitioner's designation of the parties, we shall hereinafter refer to petitioner as "Zayatz" and to respondent here as "Southern."

On February 28, 1945, Zayatz, while employed as a switchman by Southern and while engaged in such employment, in interstate transportation or in work so closely related to it as to be practically a part of it, suffered serious and permanent injuries at Sheffield, Alabama, such as, if caused by Southern's negligence, gave him a cause of action in tort for damages under the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. 51, *et seq.* (R., 2, par. III).

On April 12, 1945, in Florence, Lauderdale County, Alabama, the place of his residence (R., 2, par. II), Zayatz agreed with Southern upon a settlement of all his claims, demands, actions, or rights of action against it by reason of said injuries, accepted from it a payment of $10,000, and, in consideration thereof, executed and delivered to it a fully executed contract of release (R., 3, par. IV; R., 7-9, Exhibit "A" to Bill of Complaint).

Thereafter, through an attorney at law of St. Louis, Missouri, Zayatz notified Southern that he desired to repudiate and rescind his said contract of release and threatened to sue Southern for damages on account of said injuries in St. Louis, Missouri (approximately five hundred miles from Sheffield, Alabama, the scene of the accident), and where Southern would be put to great inconvenience, hardship, and expense to take witnesses and to produce evidence (R., 4, top, and R., 4-5, par. VI).

Thereupon there existed, and exists, an actual controversy between Southern and Zayatz as to whether the said contract of release constitutes a valid and binding contract of release and settlement (R., 3, par. V).

To determine that actual controversy as to the validity of that Alabama contract made with it by Zayatz, a citizen of Alabama, Southern brought this suit in the Circuit Court of Lauderdale County, Alabama, under the Uniform Declaratory Judgment Act of Alabama, Code of Alabama 1940, Title 7, Section 156, *et seq.*, the pertinent sections of which are set out in the appendix to this brief, for a declaration

of the respective rights of the respective parties under the said written contract (R., 6, prayers; R., 25-26, first four paragraphs of the opinion of the court below).

It is important to observe that petitioner Zayatz raises no question as to the constitutionality of this Alabama statute under the Constitution of the United States, as to its validity as being in conflict with any statute of the United States, or as to the jurisdiction of the trial court to entertain the suit or to proceed to final judgment declaring the respective rights of the parties under, and the validity or invalidity of, the said contract of release.

On the bill of complaint (R., 2-9) and a supporting affidavit (R., 9-13), the trial court, to preserve the *status quo* and to protect its jurisdiction pending final determination of the action, issued an interlocutory injunction *pendente lite* (R., 6-7, 13-14) restraining Zayatz from filing and prosecuting any suit or action against Southern based upon the said personal injuries covered by the said contract of release in controversy.

Zayatz moved to dissolve the injunction *pendente lite*, asserting that it violated a federal right of his under the venue provision of the Federal Employers' Liability Act to select his forum and institute his action in any court of the United States or of any state where valid process may be had upon Southern, regardless of inconvenience or hardship to it (R., 15-17). He also demurred to the bill of complaint on the same asserted federal ground and for want of equity, a plainly state ground (R., 17-19).

The petition here fails to recognize that the asserted federal right to select a venue of his own choosing is one which Zayatz was at perfect liberty to contract away by a valid contract of release. The issue in this case is merely as to the validity of that contract. If by a final judgment the Alabama courts hold the contract of release valid, that will be *res judicata* on Zayatz in any action he might bring under the Federal Employers' Liability Act. He will have lost his federal right of suit and selection of venue, not be-

cause of the interlocutory injunction *pendente lite*, but solely because he executed a valid contract of release.

On the other hand, if the Alabama courts by final judgment hold the contract of release invalid, then every federal right of Zayatz is not only safeguarded, but in fact greatly fortified. In that event, he is free to choose his forum and to bring his action under the Federal Employers' Liability Act, but, more than that, the final judgment of the Alabama courts holding the contract of release invalid will be *res judicata* on Southern, and it cannot rely on that contract as a defense in such suit.

After an amendment to the bill of complaint (R., 20-21), Zayatz filed a purely formal amendment to his motion to dissolve the injunction *pendente lite* (R., 21-22).

The trial court overruled the demurrer and the motion to dissolve the injunction *pendente lite* (obviously interlocutory orders) (R., 22-23), and Zayatz appealed to the Supreme Court of Alabama, the court below (R., 24).

The court below unanimously affirmed the interlocutory orders of the trial court, obviously an interlocutory and non-final order or judgment of the court below (R., 25-31).

THE JUDGMENT OF THE COURT BELOW.

Just what was before the court below and just what it decided is clearly shown in its opinion (R., 25-31).

It pointed out that this is not an action under the Federal Employers' Liability Act but is an action under the Uniform Declaratory Judgment Act of 1935, seeking to establish by judicial decree the validity of a contract fully executed by both parties and to have their rights and status thereunder declared (R., 25). It held that the trial court had jurisdiction under that statute, a holding of state law with which this Court is not concerned and which, indeed, petitioner Zayatz does not challenge (R., 25, bottom; R., 26, top).

It held that the appeal was from "an interlocutory decree" of the trial court "overruling the demurrer of defendant Zayatz to the bill * * * and his motion to dissolve the temporary injunction granted to preserve the *status quo pendente lite*" (R., 26, lines 4 to 9). It was such purely interlocutory and intermediate order which the judgment below affirmed (R., 31, bottom).

At one stage petitioner Zayatz argued in the court below that the declaratory judgment statute of Alabama authorized no more than a mere construction of a contract and did not authorize determination of disputed questions of fact (R., 28, second full paragraph). However, that position was withdrawn by his reply brief below (R., 31, last paragraph but one).

The court below held the issue in the case to be a justiciable controversy (R., 30, top). It pointed out that by the allegations of its bill Southern had assumed the burden of showing that "Zayatz, with full understanding of the nature and extent of his injuries, executed the release freely without deception or coercion," and that in proceeding to final judgment on that issue the courts of Alabama will apply federal rules as to burden and quantum of proof to determine any issues that may arise under the Federal Employers' Liability Act (R., 30).

ARGUMENT.

This Court is without jurisdiction to grant the petition since the judgment of the court below sought to be reviewed is not a final judgment.

It is clear that the judgment sought to be reviewed is an interlocutory or intermediate order by the court below affirming an interlocutory order of the trial court, which does not say the final word upon any issue in the case, and which in no way finally adjudicates the case, and that this Court is without jurisdiction to grant the writ under the jurisdictional statute (see pp. 2-3, *supra*) and under *Market*

Street R. Co. v. *Comm'n,* 324 U. S. 548, 551, and *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 123-124.

Petitioner's brief, at pages 15 to 17, recognizes the necessity of finality of judgment for review under Section 237 of the Judicial Code, 28 U. S. C. 344 (b), and undertakes to assert that the effect of the overruling of petitioner's demurrer and motion to dissolve the interlocutory injunction *pendente lite* is finally to take away from him his federal venue right, contrary to the holdings in *Baltimore & Ohio R. Co.* v. *Kepner,* 314 U. S. 44, and in *Miles* v. *Illinois Central R. Co.,* 315 U. S. 698.

But that can be so only on the unwarranted assumption that he will lose this case on the merits when the Alabama courts proceed to final judgment. If he prevails on final judgment, as we have pointed out, not only are all his federal rights fully preserved, but Southern will be bound by the holding of invalidity of the contract of release and cannot rely on it as a defense to his action under the Liability Act.

An interlocutory and non-final judgment against petitioner Zayatz cannot be converted into a final one by the simple expedient of presuming that the court of his home state and county will ultimately issue a final judgment against him.

If such final judgment should ultimately go against him, his rights under the Liability Act will have been destroyed, not because the Alabama courts have issued against him an injunction *pendente lite,* but because he settled and released those rights by a valid contract which he was perfectly competent to make and which no provision in the Federal Employers' Liability Act stood in the way of his making.

It is idle to suggest that the judgment below should be treated as final in effect because of the purely speculative hypothesis that, conceivably, if Southern and the Alabama courts are dilatory enough, the injunction *pendente lite* might remain in force throughout the entire three-year pe-

riod of limitation of the Liability Act (R., 20-21). And such a contention hardly lies in the mouth of Zayatz, when at the moment it is he who has stayed proceedings in the Alabama courts (R., 37-38) while he engages in the delay incident to attempting to have this Court review an interlocutory and non-final judgment of the Alabama court.

For all the reasons and upon the authorities above set out, we respectfully pray this Court to deny the petition.

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APPENDIX.

Alabama Code of 1940.
Title 7.

§ 156. **Scope.**—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

§ 157. **Power to construe, etc.**—Any person interested under a deed, will, written contract, or other writings constituting a contract, of whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

§ 158. **Before breach of contract.**—A contract may be construed either before or after there has been a breach thereof.

§ 159. **Who may have declaration of rights, etc.**—Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in resepct thereto: To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or other; or to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fidu-

ciary capacity; or to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

§ 160. **Enumeration not exclusive.**—The enumeration in the three preceding sections does not limit or restrict the exercise of the general powers conferred in section 156 of this title, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

§ 161. **When refusal proper.**—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

§ 162. **Review.**—All orders, judgments, and decrees under this article may be reviewed as other orders, judgments and decrees.

§ 163. **Supplemental relief.**—Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

§ 164. **Jury trial.**—When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

§ 165. **Costs.**—In any proceeding under this article the court may make such award of costs as may seem equitable and just.

§ 166. **Parties when declaratory relief is sought.**—All persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

§ 167. **Construction of article.**—This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respects to rights, status, and other legal relations; and is to be liberally construed and administered. This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.